In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1075

ROBERT VIGGIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the Eastern District of New York under 18 U.S.C. 659 and 2 for receiving and possessing goods from an interstate shipment, knowing such goods to have been stolen (App. 8a). He was sentenced to a prison term of five years and fined $5,000. The court of appeals affirmed (Pet. 1a-6a).

The sole issue raised is the sufficiency of the two affidavits for search warrants. The allegations contained in the affidavits (which are summarized in the

opinion below (Pet. App. 3a-4a) show the following: Through its own investigation, the FBI knew that a Max Miller Trucking Company truck, containing $36,000 worth of wearing apparel consigned by Russ Togs, Inc., a New York corporation, to various consignees in states outside New York, had been hijacked in Manhattan on August 20, 1968. In addition, one Magid had given information to the FBI to the effect that in August 1968 petitioner told Magid that he had just purchased a load of Russ Togs clothing for $12,000 which he wanted to resell for $17,000. In early September one Vic Orena told Magid that the load was being moved from "Viggiano's spot" to another location. On September 8, Orena gave Magid a key to a garage at 245-02 South Conduit Boulevard, Queens, New York, with instructions to show the merchandise to prospective buyers. Magid had entered the garage, most recently on October 22, 1968, and had seen a quantity of boxes bearing Russ Togs labels (some of which bore out-of-state addresses), a quantity of ladies' and children's wearing apparel bearing Russ Togs labels, and open Russ Togs boxes. This affidavit stated that Magid had given the agent the garage key.

Another affidavit submitted to the Commissioner at the same time revealed that in early October 1968 petitioner told Magid that he had received another Russ Togs load. Petitioner subsequently showed Magid a quantity of boxes bearing Russ Togs labels with out-of-state addresses in petitioner's own garage at 592 East 92nd Street. On October 7, 1968, petitioner told him that he had moved "the load" to his

brother's house "around the corner." Magid knew that Allen Viggiano, Robert's brother, lived around the corner from petitioner at 9031 Farragut Road in the third story of a two family brick dwelling which had a garage and storage room on the first floor and a tenant's quarters on the second floor. As late as October 29, 1968, petitioner told Magid that the merchandise was still at the Farragut Road address, and that Magid would be told when the shipment was moved elsewhere, but Magid had not been so informed before reporting to the FBI. This affidavit also indicated that the FBI had additional information that the Max Miller Trucking Company had been burglarized during the night of September 30, 1968 and that a quantity of Russ Togs merchandise had been stolen from their shipping depot (App. 12a-22a).

Applying the standards of *Spinelli* v. *United States*, 393 U.S. 410, and *Aguilar* v. *Texas*, 378 U.S. 108, the court below upheld the sufficiency of the affidavits. It founded its decision on the detailed information reported by Magid, which was based upon his personal observations or admissions made to him directly by petitioner; on Magid's own admissions that he was an aider and abettor; Magid's possession and surrender to the FBI of the key to the South Conduit Boulevard garage; and the independent information obtained by the FBI concerning the hijacking and burglary which was consistent with and tended to corroborate Magid's story (Pet. App. 4a-5a).

This ruling was correct. The information supplied by Magid in this case both detailed "the manner in which the information was gathered" and described

"the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor," see *Spinelli*, *supra*, 393 U.S. at 416. The added information of the agents concerning the two stolen shipments of Russ Togs clothing complemented and tended to corroborate the information furnished by Magid. See *Eaton* v. *United States*, 409 F. 2d 1355 (C.A. 5), certiorari denied, 396 U.S. 891. Another consideration, not stressed in the opinion below, is that here the name of the informer was revealed in the affidavit for the search warrant. The commissioner thus had a sound basis for determining that the information before him was not based on rumor.

To the extent that this case involves the use of information supplied by an informant who had not previously furnished information to the police, it is related to *United States* v. *Harris*, No. 30, this Term, certiorari granted February 24, 1970 (397 U.S. 905). Since, however, each search warrant case turns on its own particular facts and in this case the affidavits were clearly sufficient to establish probable cause, there is, in our view, no reason to delay action on this petition pending decision in *Harris*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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